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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1955

No. [REDACTED] 48

UNITED STATES OF AMERICA for the Benefit and on
Behalf of HARRY SHERMAN, CHAS. ROBINSON,
RONALD D. WRIGHT, STUART SCOFIELD, LEE
LALOR, WILLIAM AMES, ERNEST CLEMENTS, CARL
LAWRENCE, GORDON POLLOCK and HAROLD SJO-
BERG, as Trustees of the Laborers Health and
Welfare Trust Fund for Northern California,
Petitioners,

vs.

DONALD G. CARTER, Individually; DONALD G.
CARTER, Doing Business as Carter Construction
Company, CARTER CONSTRUCTION COMPANY and
HARTFORD ACCIDENT AND INDEMNITY CO.,
Respondents.

RESPONDENTS' BRIEF.

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Subject Index

	Page
I. Question presented	1
II. Statement of case	2
III. Summary of argument	6
IV. Argument	10
A. The surety is not liable for employer-contributions to health and welfare fund	10
1. Since all persons supplying labor in the prosecution of the work provided for in the contract have been paid their wages in full, the condition of the payment bond has been fulfilled, the requirements of the Miller Act are satisfied and no liability rests with the surety to pay the amounts claimed by the trustees of the welfare fund for unpaid contributions of the employer	10
2. The employer-contributions to the Health and Welfare Fund did not constitute "wages" ...	12
A. Even had said contributions been considered as wages, the surety would not be liable to the trustees of the Fund for said contributions because the contractor had paid the laborers in full	12
3. Not only have all of the obligations of the surety been satisfied according to the condition of the bond, but also the plaintiffs in this action are not persons who furnish labor or material in the prosecution of the work provided for in the contract nor are the amounts sought to be recovered "sums justly due" to persons who furnish the labor	26
B. The surety is not liable for attorneys' fees nor for liquidated damages under the bond	32
1. Attorneys' fees are not recoverable under the Miller Act	32
2. Liquidated damages are not recoverable	33
V. Conclusion	34

Table of Authorities Cited

Cases	Pages
Adams v. San Francisco (1949), 94 Cal. App. 2d 586	7
Bernard v. Indemnity Insurance Co. of North America (Superior Court, State of California, Los Angeles County, No. 654,738	8
Bill Curphy Co. v. Elliott (1953), 207 F. 2d 107	7, 8, 19, 28
Central Bank v. U. S. (1952), 345 U.S. 639, 73 S. Ct. 917, 97 L.ed. 1312	8, 23, 24
City of Portland ex rel. National Hospital Association v. Heller, 9 Pac. 2d 115, 139 Oregon 179	7, 17
Clifford F. MacEvoy Co. v. United States, for the use and benefit of Calvin Tompkins Co., supra, 88 L.ed. 1163, 64 S.Ct. 890	6, 9, 11, 28
Coos Bay Lumber Co. v. Local 7-116 (1955), 203 Oregon 234, 279 Pac. 2d 508	16
Fireman's Fund Indemnity Co. v. U. S. (9th Circuit), 210 F. 2d 472	8, 23
General Casualty Co. of America v. U. S. (5th Circuit), 205 F. 2d 753	8, 23
In re Brussel (1955 D.C. N.Y.), 135 Fed. Supp. 827	7, 12, 13
In re Louisville Daily News & Enquirer, 20 Fed. Supp. 465.	30, 32
U. S. ex rel. New York Casualty Co. v. Standard Surety & Casualty Co. of New York (1940), 32 Fed. Supp. 836	7, 19
U. S. ex rel. Southern G.-F. Co. v. Landis & Young, 16 Fed. Supp. 832	7, 9, 18, 28, 30
U. S. Fidelity & Guaranty Company v. United States (1952), 201 Fed. 21 118	8, 21
U. S. for use of Dorfman v. Standard Surety and Casualty Co. of New York (1941), 37 Fed. Supp. 323	7, 8, 19
U. S. for the use of Edward E. Morgan Co., Inc. v. Mary- land Casualty Co., 1945, 147 F. 2d 423	9, 33
U. S. for use of Gibson v. Harman (1951), 192 F. 2d 999	7, 9, 19, 30, 34

TABLE OF AUTHORITIES CITED

iii

	Pages
U. S. for use of Watsabaugh & Co. v. Seaboard Surety Com- pany, 26 Fed. Supp. 681	9, 33
United States v. Breeden (1953), 110 Fed. Supp. 713	33
United States v. Crosland Construction Company (1954, 4th Cir.), 217 F. 2d 275	8, 23
United States v. Henley (1954), 117 Fed. Supp. 928	33
United States v. Zschach Construction Co. (10th Circuit), 209 F. 2d 347	8, 23
Westover v. William Simpson Construction Co. (9th Cir- cuit), 208 F. 2d 908	8, 23

Statutes

Bankruptcy Act, Section 64, Subpar. a(2), 11 U.S.C.A., 104 Subpar. a(2)	12
California Insurance Code, Secs. 10202-8 and 10270-5	15
California Labor Code, Sec. 204	15
Davis-Bacon Act. 46 Stat. 1494, 40 U.S.C., Sec. 276a-7	15
Miller Act, 40 U.S.C.A. 270a-270d	1, 3, 6, 10, 27

Texts

22 Opinions of Attorney General of California, 498	7, 16
8 Stanford Law Review 655, July 1956	31

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No. 752

UNITED STATES OF AMERICA for the Benefit and on
Behalf of HARRY SHERMAN, CHAS. ROBINSON,
RONALD D. WRIGHT, STUART SCOFIELD, LEE
LALOR, WILLIAM AMES, ERNEST CLEMENTS, CARL
LAWRENCE, GORDON POLLOCK and HAROLD SJÖ-
BERG, as Trustees of the Laborers Health and
Welfare Trust Fund for Northern California,

Petitioners,

VS.

DONALD G. CARTER, Individually; DONALD G.
CARTER, Doing Business as Carter Construction
Company, CARTER CONSTRUCTION COMPANY and
HARTFORD ACCIDENT AND INDEMNITY CO.,

Respondents.

RESPONDENTS' BRIEF.

I.

QUESTION PRESENTED.

Should the surety on a payment bond, given pursuant to the Miller Act (40 U.S.C.A. (270a *et seq.*),

the condition of which is that the contractor promptly pay all persons supplying labor in the prosecution of the work provided in a contract between the contractor and the United States, be held liable to the trustees of a Health and Welfare Fund for unpaid employer-contributions, liquidated damages and attorneys' fees provided for in a Trust Agreement entered into by the contractor and a union independent of the construction contract with the United States, notwithstanding the fact that the contractor has paid all persons performing labor all wages provided for in the construction contract in full, without deduction?

II.

STATEMENT OF CASE.

In November 1952 Donald G. Carter, doing business as Carter Construction Company (hereinafter referred to as Carter), as contractor, entered into two contracts in writing with the United States of America wherein he agreed to furnish materials and perform work for the construction and completion of the Flyaway Kit Storage Building at Travis Air Force Base in Solano County and the Navigation Trainer Building at Mather Field in Sacramento County, California. (Par. V, Amended Complaint, R. 5, 6.)

Each of the contracts provided in Paragraph 14 that the contractor shall pay "all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week,

and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by applicable regulations prescribed by the Secretary of Labor), the full amounts accrued at time of payment computed at wage rates not less than those stated in the specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or sub-contractor, and the laborers and mechanics . . ." (Admission of Facts, Par. 2, R. 13.)

As required by the provisions of the Miller Act (40 U.S.C.A. 270a-270d) Carter furnished both a performance bond and a payment bond on which the respondent Hartford Accident and Indemnity Company is surety. (Exhibits A and B, R. 15-19.)

The condition of the payment bond is that "if the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract . . . then this obligation to be void; otherwise to remain in force and virtue." (R. 19.)

It is admitted that the defendant Carter paid to his laborers all of the wages required by him to be paid under his contracts with the United States in full and without deduction. (Par. 3, Admission of Facts, R. 13, 14.)

The defendant Carter then became bankrupt. (R. 41.)

None of the plaintiffs in this action were employees of the contractor Carter. The plaintiffs herein are

suing as the trustees of a Health and Welfare Trust Fund (hereinafter referred to as the Fund) (Par. I, Amended Complaint, R. 4) which was created after the building contract was entered into by a trust agreement dated March 4, 1953 (Par. IX, Amended Complaint, R. 7) for contributions to said fund which the contractor Carter failed to make for the months of February, March and April, 1953. (Par. XI, Amended Complaint, R. 9.)

The trust agreement specifically provides that "contributions to the Fund shall not constitute or be deemed to be wages due to the employees with respect to whose work such payments are made, and no employee shall be entitled to receive any part of the contributions made or required to be made to the Fund in lieu of the benefits provided by the Health and Welfare Plan. (Art. II, Sec. 3, p. 3, Trust Agreement, R. 21.)

The trust agreement further specifically provides that no beneficiary of the plan shall have any rights, title or interest in the Fund other than as specifically provided therein. (Art. II, Sec. 4, pp. 3-4, Trust Agreement, R. 21) and further provides that none of the contributions to the Fund are in any manner liable for any debts, contracts, or liabilities of any employee nor is any part of the Fund or any benefits payable in accordance with the Health and Welfare Plan subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge by any person. (Art. II, Sec. 4, p. 4, Trust Agreement.)

Power is given to the board of trustees of the trust agreement to enforce prompt payment of contributions. (Art. IV, Sec. 3, p. 8, Trust Agreement, R. 21.) However, no employee has any right or claim to benefits under the Health and Welfare Plan except as specified in the policies. (Art. VIII, Sec. 2, p. 17, Trust Agreement, R. 21.)

An employee in order to acquire any right to benefits under the Fund is required to work 400 hours in a six-month period. Once he has worked 400 hours, the employee receives the insurance protection for the succeeding six-month period whether or not he continues to work in the industry. However, if he ceases working in the industry, he loses his eligibility for benefits when the six-month eligibility period is up. (R. 40.)

The trustees are required to utilize the contributions to purchase insurance policies (Art. IV, Sec. 4, p. 8, Trust Agreement, R. 21), and the employees have no right or claim to benefits under the plan except as provided in the insurance policies so procured. (Art. VIII, Sec. 2, p. 17, Trust Agreement, R. 21.)

The measure of eligibility of an employee is whether or not he works 400 hours in a given six-month period—not that his employer make the contributions required by the trust agreement. (R. 42, 43 and 44, Opening Brief of Petitioners, pp. 13, 14.)

It is also to be noted that the contributions are made to the Fund by the employer whether or not the employee subsequently becomes eligible for any benefits. (Par. 1, Recitals, p. 1, Trust Agreement, R. 21.)

The employee makes no contribution to the Fund (R. 49) nor does he pay any income tax on the amount of the employer's contribution. (R. 51.)

It is conceded that the trustees are not suing for any benefits on behalf of the employees. (R. 42.)

III.

SUMMARY OF ARGUMENT.

Because all employees furnishing labor in the prosecution of the work provided for in the contract have been paid their wages in full, without deduction, the condition of the payment bond has been fulfilled, the requirements of the Miller Act are satisfied and the amounts claimed by the trustees of the Health and Welfare Fund for unpaid contributions of the employer, for liquidated damages and for attorneys' fees, cannot be recovered from the surety on the payment bond.

A. There are at least three basic reasons why the surety is not liable to the trustees for the delinquent employer-contributions:

1. The contractor having paid all laborers in full without deduction, the express condition of the payment bond has been fulfilled and requirements of the Miller Act satisfied.

40 U.S.C.A. 270a and 270b.

Clifford F. MacEvoy Co. v. U. S. for the use and benefit of Calvin Tomkins Co., (1943), 322 U.S. 102, 88 L.ed. 1163, 64 S.Ct. 890.

2. The unpaid employer-contributions which are the subject of this suit do not constitute wages.

In Re Brassel (1955), 135 Fed. Supp. 827;

22 Opinions of Attorney General of California, 198;

Adams v. San Francisco (1949), 94 Cal. App. 2d 586;

City of Portland ex rel National Hospital Association v. Heller, 139 Oregon 179, 9 Pac. 2d 115;

U. S. ex rel Southern G.-F. Co. v. Landis & Young, 16 Fed. Supp. 832;

U. S. ex rel New York Casualty Co. v. Standard Surety & Casualty Co. of New York (1940), 32 Fed. Supp. 836;

Bill Curphy Co. v. Elliott (1953), 207 F. 2d 103;

U. S. for use of Dorfman v. Standard Surety & Casualty Co. of New York (1941), 37 Fed. Supp. 323;

U. S. for use of Gibson v. Harman (1951), 192 F. 2d 999.

(a) Even assuming that the employer-contributions were considered to be wages, since the contractor has paid his laborers in full, the surety is not liable for such unpaid contributions. The obligation to pay the contributions into the Health and Welfare Fund did not arise under the contract between the United States and the contractor but was created by an agree-

ment entered into between the contractor and a union independent of the contract with the United States.

U. S. Fidelity & Guaranty Company v. United States (1952), 201 Fed. 2d 118;

United States v. Crosland Construction Company (1954), (4th Circuit), 217 F. 2d 275;

United States v. Zschach Construction Co. (10th Circuit), 209 F. 2d 347;

Westover v. William Simpson Construction Co. (9th Circuit), 209 F. 2d 908;

Fireman's Fund Indemnity Co. v. U. S. (9th Circuit), 210 F. 2d 472;

General Casualty Co. of America v. U. S. (5th Circuit), 205 F. 2d 753;

Central Bank v. U. S. (1952), 345 U.S. 639, 73 S.Ct. 917, 97 L.ed. 1312;

Bernard v. Indemnity Insurance Co. of North America (Superior Court, State of California, Los Angeles County, No. 654738, Attached as Appendix A).

3. The plaintiffs were not "persons supplying labor . . . in the prosecution of the work provided for" in the contract between Carter and the United States and are therefore not persons entitled to recovery under the Act or to protection under the payment bond.

Bill Curphy Co. v. Elliott (1953), 207 F. 2d 103;

N.S. for use of Dorfman v. Standard Surety and Casualty Co. of New York (1941), 37 Fed. Supp. 323;

Clifford F. MacEvoy Co. v. United States, for the use and benefit of Calvin Tomkins Co., 322 U.S. 102, 88 L.ed. 1163, 64 S.Ct. 890; *U. S. ex rel Southern G.-F. Co. v. Landis & Young*, 16 Fed. Supp. 832.

B. The surety is not liable for either attorneys' fees or liquidated damages because:

1. Liability of the contractor, if any, for said damages and attorneys' fees arises by virtue of an agreement with the union independent of his contract with the United States.

2. In any event, a surety under the Miller Act is not liable for a claim for damages.

U. S. for use of Edward E. Morgan Co., Inc. v. Maryland Casualty Co. (1945), 147 F. 2d 423; *U. S. for use of Gibson v. Harman*, 192 F. 2d 999.

3. Attorneys' fees are not recoverable under the Miller Act in the absence of a State statute requiring such payment.

U. S. for use of Watsabaugh & Co. v. Seaboard Surety Company, 26 Fed. Supp. 681.

IV.

ARGUMENT.

A. THE SURETY IS NOT LIABLE FOR EMPLOYER CONTRIBUTIONS TO HEALTH AND WELFARE FUND.

1. Since all persons supplying labor in the prosecution of the work provided for in the contract have been paid their wages in full, the condition of the payment bond has been fulfilled, the requirements of the Miller Act are satisfied and no liability rests with the surety to pay the amounts claimed by the trustees of the welfare fund for unpaid contributions of the employer.

The measure of the contractual obligation of the surety is set forth in the Bond as follows: "... if the principal shall promptly make payment to all persons supplying labor . . . in the prosecution of the work provided for in said contract . . . then this obligation to be void . . ." (R. 19.)

This is in accordance with the provisions of Section 1 of the Miller Act requiring a payment bond "for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person" (40 U.S.C.A. 270a (2)), and which Act provides that "every person who has furnished labor . . . in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under this Act and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him . . . for which such claim is made, shall have the right to sue on such payment bond for the amount, or balance thereof, unpaid at the time of institution of such suit and to prosecute

said action to final execution and judgment for the sum or sums justly due him . . ." (40 U.S.C.A. 270b.)

It has been stipulated that all laborers have been paid their wages in full without deduction or rebate. (R. 14.)

Therefore, the condition of the payment bond having been fulfilled, it should be clear that no further liability exists on the part of the surety, unless the conditions expressed both in the Miller Act and the bond lack meaning or force.

In the case of *Clifford F. MacEvoy Co. v. U. S.*, for use and benefit of Calvin Tomkins Co., 322 U.S. 102, 88 L.ed. 1163, 64 Sup. Ct. 690, the Court, in holding that a person supplying material to a materialman of a Government contractor (as distinguished from a sub-contractor), and to whom an unpaid balance is due from the materialman, cannot recover on the payment bond executed by the contractor, stated that:

"The Miller Act, like the Heard Act, is highly remedial in nature. It is entitled to a liberal construction and application in order properly to effectuate the Congressional intent to protect those whose labor and material goes into public projects. (Citation of Cases.) But such a salutary policy does not justify ignoring plain words of limitation and imposing wholesale liability on payment bonds."

2. The employer-contributions to the Health and Welfare Fund did not constitute "wages".

A. Even had said contributions been considered as wages, the surety would not be liable to the trustees of the Fund for said contributions because the contractor had paid the laborers in full.

The petitioners have made the contention that the employer-contributions were part of the compensation of the laborers which remains unpaid. (Pet. Brief, pp. 17-27.)

Such contention, of course, is directly contrary to the express provisions of the agreement establishing the Fund which specifically provides that such contributions are not to be deemed wages and which effectively eliminates any possibility that the individual employee has any interest in the contributions. (R. 21.)

A similar contention was made in the case of *In re Brassel* (1955 D.C. N.Y.), 135 Fed. Supp. 827, wherein the trustees of a welfare fund claimed a priority status for contributions to their fund which had not been paid by the bankrupt. The trustees contended that the unpaid contributions were entitled to priority by reason of Section 64, Subpar. a(2) of the Bankruptcy Act, 11 U.S.C.A., 104 Sub. a(2), which grants priority to wages not exceeding \$600.00 to each claimant earned within three months before the date of the commencement of the proceedings, due to workmen.

At page 830 the Court stated:

"The ultimate contention here, however, is one of priority. Liberality of construction of the term 'wages' does not justify a nullification of the language of the statute which grants priority only

to 'wages . . . due to workmen'. The employer's contribution here is never due to the employee. He may not enforce the employer's liability therefor. The employee never had an individual or assignable proprietary interest in the contribution or to the fund of which the contribution became a part . . ."

In the *Brassel* case the Court noted that the contributions are not subject to income or withholding taxes (which is the situation in the instant case. R. 51); that the contribution bears no relation to the wages of the employee except insofar as the wages are part of the formula by which the contribution is measured and that any other yardstick could have been used (which is the situation in the present case where the contributions were based on the hours worked (Recitals, subpar. 1, p. 1 of the Trust Agreement, R. 21)) and that the "ultimate benefit to the individual workman is dependent upon such union membership rather than upon his employment or by the contribution made by his employer."

The entitlement to benefits in the present case is also entirely unrelated to the relationship of employer and employee but rather upon eligibility established through working 400 hours during a six-month period. (R. 40, 42-44.)

Despite the elaborate arguments of petitioners, the undisputed fact remains that the laborers had no interest in the contributions which the contractor was to make pursuant to the separate agreement establishing the trust fund and the contributions bore no rela-

tionship whatsoever to the prosecution of the work which the contractor undertook to perform for the United States.

Nothing remains due the laborers and they have no claim which they can prosecute or assign to others.

The argument that until the contributions have been made the laborers have not been paid in full for their labor (Petitioner's Opening Brief, pp. 17-28) is to disregard the plain language of the case above cited, and the terms of the trust agreement.

As was pointed out previously and conceded by the petitioners, the trust agreement itself provides that the contributions shall not constitute nor be deemed to be wages. (Sec. III, Art. 2, Trust Agreement, R. 21.)

The petitioners cannot avoid the plain fact that the employees have been paid in full according to the contract of Carter with the United States and any claims on the part of the trust arise independently of said contract.

Petitioners state that at the time the master labor agreements were negotiated, it was impossible to grant wage increases because of federal wage controls and the governing policies and regulations of the Construction Industry Stabilization Commission indicated that any increases would not be approved. (Petitioners' Brief, p. 18.)

The petitioners admit that of equal importance was the fact that the casual nature of employment in the building and construction industry made direct

employer contribution *unfettered by possible* claims of *individual workmen* a practical necessity. (Petitioners' Brief, p. 18.)

Furthermore, petitioners admit that it was doubtful whether deductions for payments for Health and Welfare Funds could have been approved because of the provisions of the Davis-Bacon Act, 46 Stat. 1494; 40 U.S.C. Secs. 276a-7, prohibiting deductions from wages on federal public jobs. (Petitioners' Brief, p. 19.) There were also apparently problems under the rules of the Wage and Hour Administration and the California Labor Code, Sec. 204, and California Insurance Code, Secs. 10202-8 and 10270-5.

From the foregoing the petitioners argue that the employer-contributions were considered in the minds of the parties to the agreement to be part of the compensation for the services of the employees.

Far from establishing such meaning, the facts set forth by petitioners as constituting the reasons for the manner in which the contributions were treated in the agreement seem clearly to establish that said contributions were not compensation of the employees. To contend that the parties to the trust agreement intended something other than what they expressed in plain language is to admit the attempt to evade the statutory restrictions by a subterfuge.

In any event, the background set forth by petitioners is immaterial and irrelevant. The trust agreement speaks for itself regardless of the motives which directed the form in which it was finally executed.

The case of *Coos Bay Lumber Co. v. Local 7-116* (1955), 203 Oregon 234, 279 Pac. 2d 508, is not in point. The question in that case was whether or not federal or Oregon law authorized the union through collective bargaining to commit the wages of the employees which it represented to the financing of employee group insurance programs. The validity or invalidity of such agreement is not in issue here and the question has no relevancy as to whether or not the trustees of a welfare fund can recover unpaid contributions from a Miller Act surety.

The Attorney General of the State of California has expressed his views concerning the nature of contributions identical to those at bar. In 22 Opinions of the Attorney General, 198, he distinguished "between pay and compensation on the one hand and the conditions of employment on the other" and concluded that payments such as these fall within the latter category. We quote from his opinion, beginning at page 199:

"The agreement covering the welfare plan usually, although not universally, stipulates that the money paid by the employer into the fund for each hour worked by employees covered by the contract is not wages. It is the general understanding that welfare fund payments are not paid as wages to the employees covered by the plan.

"A distinction has been drawn between pay and compensation on the one hand and the conditions of employment on the other. In *Adams v. San Francisco* (1949), 94 Cal. App. 2d 586, this distinction became important under the San Fran-

cisco charter provisions. In that case sick and disability leaves were characterized as phases of working conditions, but holiday pay, overtime pay, and vacation pay were said to be related to compensation or wages. The court said, at page 596: 'There are two goals to be obtained by the employer and employee in the promotion of the employee's welfare, namely, the fostering of better working conditions for the employee and the opportunity for profitable employment. The aims may be far apart or closely interwoven. The means to obtain the end converge or divert.'"

and at page 200:

"Aside from this, by their very nature such payments and benefits do not appear to be wages. The employee does not receive the money from the employer. The benefits are not a tangible asset given to the employee but are received by him only if he meets certain eligibility conditions set up in the welfare plan. Historically, housing, meals, bonuses, and the like have been considered to be compensation, but prepaid medical, accident, disability, and other like benefits have not been considered wages."

In *City of Portland ex rel. National Hospital Association v. Heller*, 9 Pac. 2d 115, 139 Oregon 179, the contractor contracted with the plaintiff to pay for medical services to be rendered by the latter to the former's employees, the consideration therefor to be based upon the number of employees and the days worked by each, said consideration to be deducted from the wages due. The plaintiff brought its action

against the contractor and the latter's surety for a balance due it for such services, and recovered judgment. The Supreme Court of Oregon reversed as to the surety, saying:

"It is admitted that the service rendered by the association is not 'labor or material' furnished under the contract of the contractor with the City of Portland for which the surety is bound",

and:

"It makes little difference whether we treat this case as an action at law or as a suit in equity; in either event, there is no evidence on which to base a finding and judgment against the surety."

In *United States ex rel. Southern G.-F. Company v. Landis & Young*, 16 Fed. Supp. 832, the American Employers Insurance Company, as intervenor, sought to recover premiums upon a policy of employers liability insurance, contending that it had furnished labor in the form of medical attention, medicines and hospital services. In a carefully considered and well reasoned opinion, the Court denied the claim, saying in part:

"It is not contended that any materials other than medicines and hospital treatment, were actually furnished by this intervenor, and if it is to recover, the same must be upon the theory that the amount claimed was for labor furnished in the prosecution of the work. Payment of hospital and doctor bills could only indirectly affect the progress of the work by restoring the laborer to a condition which would enable him to subsequently return to the job."

To the same effect is *U. S. ex rel. New York Casualty Co. v. Standard Surety and Casualty Co. of New York* (1940), 32 Fed. Supp. 836, wherein the Court in considering whether or not the surety was liable for unpaid insurance premiums for workmen's compensation and employer's liability policies stated "I think it is too plain for argument that insurance premiums on workmen's compensation and employer's liability policies are not within the protection of the Heard Act (Heard Act, 40 U.S.C.A. 270). These premiums are not 'labor and materials' and only persons who have furnished labor or materials are entitled to intervene." (p. 836).

Also, similar situations are presented in those cases which deny recovery against the surety on behalf of persons who have loaned money to the contractor to be used and which is actually used to pay for labor. *Bill Curphy Co. v. Elliott* (1953), 207 F. 2d 103; *United States for Use of Dorfman v. Standard Surety and Casualty Co. of New York* (1941), 37 Fed. Supp. 323.

The petitioners have cited no authority contrary to the principles herein above expressed.

In the case of *United States for the Use of Gibson v. Harman* (1951), 192 F. 2d 999, an action was commenced for recovery of a workmen's compensation award by the employee of an insolvent contractor who had let his workmen's compensation insurance lapse contrary to state law. In holding that the surety was not liable because the claim was not for "labor", the

Court stated, at page 1001, in language directly applicable here:

"We recognize that the statute is to be given a liberal construction so as to protect fully the furnishing of labor or materials for government work. *Clifford F. MacEvoy Co. v. United States for use and benefit of Calvin Tomkins Co.*, 322 U.S. 102, 64 S.Ct. 890, 88 L.ed. 1163; *Brogan v. National Surety Co.*, 246 U.S. 257, 38 S.Ct. 250, 62 L.ed. 703; *Ross Engineering Co. v. Pace*, 4 Cir., 153 F.2d 35. We do not think, however, that the most liberal construction would justify the holding that a compensation award is within its coverage. Such an award is not within the language of the statute as it is neither labor nor materials; and it clearly does not fall within the legislative purpose which was to provide for those supplying labor and materials for government construction protection equivalent to that furnished in the case of private construction by mechanics and materialmen's liens."

(a) *Even assuming that the employer-contributions were wages, since the contractor has paid the laborers in full, the surety would not be liable for the unpaid contributions because the obligation to pay the contributions into the Health and Welfare Fund is not based on the contract between the United States and the contractor but was an obligation created by an independent agreement between the contractor and union.*

If the plain language of the trust agreement, the bond, and the Miller Act should be disregarded and

the rules set forth in the cases above cited be ignored, the petitioners still cannot recover because they have not established the first condition of recovery, namely: nonpayment of the laborers.

Although this is a case of first instance on the precise facts presented, the same basic issue has been presented in the case of *U. S. Fidelity & Guaranty Co. v. U. S.* (1952), 201 Fed. 2d 118, in which a subcontractor defaulted and among other things was indebted at the time of his default to the United States for withholding taxes withheld from its employees on their wages but not paid to the Government.

The surety company, which had written the subcontractor's payment bond, claimed the right to unpaid balances owing the subcontractor by virtue of assignments to it of all funds due under its contract with the United States as provided for in the application for the bond executed by the subcontractor. The United States claimed a prior right thereto in satisfaction of its lien against the subcontractor because of his failure to pay over the amounts withheld.

The Court held that the surety was not liable to the United States under its bond for the taxes withheld from wages but not paid over.

The Court reasoned that the employer had discharged its contractual obligation to pay in full the wages of those performing labor and therefore the surety was not liable because all payments for labor had been made.

The Court stated at page 121 as follows:

"The reasons that impel us to conclude that Kendrick's liability for these taxes was not a liability for the payment of wages and that failure to pay them to the Government was not a breach of its contractual obligation to pay all wages and material claims requires the same conclusions with respect to this contention. The debate on the floor of Congress indicates that the performance bond of the Miller Act was to make the contractor liable for default by reason of his inability to complete the contract or by reason of failure to meet the requirements and specifications as to material, and that the payment bond was to insure the contractor's liability for claims of subcontractors, materialmen and laborers. There is nothing in the legislative history of the Miller Act or the acts which it succeeded to indicate that the performance bond was to cover any obligations other than the requirement that the contractor complete his contract according to its specifications."

The Court pointed out at page 120 that from the statutes and regulations set out in the case "it seems clear that when an employer withholds the tax from an employee's wage and pays him the balance, the employee has been paid in full. He has received his full wage. Part of it has gone to pay his withholding tax and the balance he has. The employer has discharged his contractual obligation to pay the full wage. Thereafter there remains only his liability for the tax which he has collected. That is a tax liability for which he alone is liable to the Government as for any other taxes which he may owe."

To the same effect are *United States v. Crosland Construction Company* (1954, 4th Cir.), 217 F. 2d 275; *United States v. Zschach Construction Co.* (10th Cir.), 209 F. 2d 347; *Westover v. William Simpson Construction Co.* (9th Cir.), 209 F. 2d 908; *Fireman's Fund Indemnity Co. v. U. S.* (9th Cir.), 210 F. 2d 472; *General Casualty Co. of America v. U. S.* (5th Cir.), 205 F. 2d 753.

The Court in *U. S. v. Crosland*, supra, 217 F. 2d 275, pointed out that the decision is supported by *Central Bank v. U. S.* (1952), 345 U.S. 639, 73 S.Ct. 917, 97 L.ed. 1312:

"That the Government's claim against the contractor for amounts withheld could not be set off against amounts due the contractor's assignee because of the provision of the Assignment of Claims Act, 54 Stat. 1029, 31 U.S.C.A. Sec. 203, that 'such payments shall not be subject to reduction or set off for any "indebtedness of the assignor to the United States arising independently of such contract."' The Supreme Court said:

"The requirement that Graham withhold taxes from the 'payment of wages' to its employees and pay the same over to the United States did not arise from the contract. The requirement is squarely imposed by §§1401 and 1622 of the Internal Revenue Code. Without a government contract Graham would owe the statutory duty to pay over the taxes due, just as it would to pay its income tax on profits earned. Graham's embezzlement lay neither in execution nor in breach of the contract. It arose from the conversion of the withheld taxes

which Graham held as trustee for the United States pursuant to §3661 of the Code. Assignor Graham's indebtedness to the United States arose, we think, 'independently' of the contract. 345 U.S. at pages 645, 646, 73 S.Ct. at page 920.

"We agree with the Fifth Circuit: 'Though measured by the amount of wages, the money due the United States was owing as taxes and not as wages.' *General Casualty Co. of America v. U. S.*, 205 F.2d at page 755. Such a claim is not covered by the bond in this case. The judgment of the District Court must be affirmed."

In the *Central Bank v. U. S.*, supra, the Graham Company had entered into a contract and as permitted by the Assignment of Claims Act of 1940 the contract authorized Graham to assign the proceeds of the contract to a bank and payments to the assignee bank were not to be "subject to reduction or set off for any indebtedness of the contractor to the Government arising independently of this contract." The question in issue before the Court was whether or not withholding taxes and Federal unemployment taxes which the Graham Company had withheld from salaries and wages of employees constituted an indebtedness arising "independently" of the contract. The Court held that the obligation of the Graham Company to the Government was independent of the contract, using the language above quoted.

The reasoning of the cases cited would seem decisive in settling the issue in the instant cases. Unlike the withholding tax cases, here there were no deduc-

tions made from the employees' salaries. The employees were paid *in full without deduction*. (R. 14.)

Furthermore, the obligation of the contractor to pay the contributions arises not by virtue of his contract with the United States to which the performance bond of the defendant surety relates but rather to the Trust Agreement established many months after the contract with the United States was entered into. (R. 21.)

And as has been pointed out in detail, the Trust Agreement itself specifically provides that the contributions to the Fund would not constitute or be deemed to be wages due to the employees (Art. II, Sec. 3, Trust Agreement, R. 21) and the employee loses nothing by the nonpayment of the contributions because his benefits are conditioned not on the employer-employee relationship or on the employer's contributions but rather on the number of hours worked in the industry during a given six-month period. The case of *Sherman v. Achterman* (San Francisco Superior Court No. 2368-2370, App. C. to Petition for Certiorari, p. XV), seems of little persuasive force. Since the rendition of the decision in that case, another written opinion was rendered in the Superior Court of the State of California, in and for the County of Los Angeles, in the case of *J. W. Bernard v. Indemnity Insurance Company of North America*, No. 654738. (An appeal is apparently pending.) Being unreported, we attach a copy of said judgment and the memorandum and order as Appendix A. This decision we feel answers completely

the faulty reasoning contained in the case of *Sherman v. Achterman*, wherein the majority of the Court attempted to distinguish the provisions of the Miller Act and those of the applicable state statute. Of course, if there were no distinction, the case was wrongly decided for the reasons given above in this brief. If there were such distinctions, the case, of course, would not be controlling.

3. Not only have all of the obligations of the surety been satisfied according to the condition of the bond, but also the plaintiffs in this action are not persons who furnished labor or material in the prosecution of the work provided for in the contract nor are the amounts sought to be recovered "sums justly due" to persons who furnished the labor.

As the Circuit Court has pointed out, the petitioners are not persons who furnished labor or materials and therefore may not maintain an action for recovery on the bond. (R. 64.)

However, the Court went on to say that even if it were to assume that petitioners were authorized to maintain the action "for and on behalf of persons who furnished labor, recovery could not be had because the delinquent payment sought to be recovered are not 'sums justly due' the persons who furnished the labor."

The Miller Act gives a cause of action against the surety to "*every person who has furnished labor . . . in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under Section 270a of this title and who has not been paid in full therefor . . .*" and permits such person "the right to sue on such payment bond for

the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums *justly due him . . .*" (40 U.S.C.A. 270b, italicizing added.)

The bond itself sets forth the condition that the "principal shall promptly make payment *to all persons supplying labor . . .*"

It cannot be argued that the petitioners, who are trustees of a Health and Welfare Fund, are "persons who furnished labor" in the prosecution of the work specified in the contract between the contractor and the United States—no matter what the nature of the employer-contributions which are provided in the trust agreement.

Therefore, by reason of the plain wording of the Miller Act petitioners are not persons entitled to recover against surety.

Petitioners attempt to avoid the requirement of the Act by arguing that there has been an equitable assignment of the rights and claims of the laborers.

This reasoning, however, overlooks the fact that petitioners are not suing as assignees, or for or on behalf of the laborers, but rather are suing in their own right as trustees of the Fund pursuant to the trust agreement. As a matter of fact, the employees themselves have been paid in full and have no cause of action against either the contractor or the surety and the only persons authorized to sue under the trust agreement are the trustees. (See Art. IV, pp. 7-8, Trust Agreement, R. 21.)

Thus, there is nothing "justly due" to the laborers themselves which has been or can be assigned to the petitioners herein.

The argument of petitioners begs the very question in issue.

There are, therefore, three basic reasons why the surety has no liability to the trustees of the Health and Welfare Fund:

First, the persons who actually furnished labor on the job have been paid in full pursuant to the contract so there is nothing "justly due" them.

Second, the petitioners in any event are not "persons who supplied labor or material in the prosecution of the work."

Third, the amounts claimed by the petitioners are not for work provided for in the contract.

The contentions of the petitioners that they are in the status of assignees of the laborers have no more validity than would a similar claim by the person to whom the Workmen's Compensation premiums were unpaid (*U. S. ex rel Southern G.-F. Co. v. Landis & Young, supra*, 16 Fed. Supp. 832) or the persons who loaned the money with which laborers were paid on a Federal public job (*Bill Curphy Co. v. Elliott, supra*, 207 F. 2d 103).

The requirements of the Miller Act in respect to who is entitled to sue thereunder are clearly set forth in *Clifford F. MacEvoy Co. v. United States*, for the use and benefit of Calvin Tomkins Co., *supra*, 88 L.ed. 1163, 64 S.Ct. 890:

"The proviso of Section 2(a), which had no counterpart in the Heard Act, makes clear that the right to bring suit on a payment bond is limited to (1) those materialmen, laborers and subcontractors who deal directly with the prime contractor and (2) those materialmen, laborers and sub-subcontractors who, lacking express or implied contractual relationship with the prime contractor, have direct contractual relationship with a subcontractor and who give the statutory notice of their claims to the prime contractor. To allow those in more remote relationships to recover on the bond would be contrary to the clear language of the proviso and to the expressed will of the framers of the Act. Moreover, it would lead to the absurd result of requiring notice from persons in direct contractual relationship with a subcontractor but not from more remote claimants."

The argument that public interest requires an interpretation of the Miller Act which would disregard the limitations expressed therein is without merit.

First, the petitioners assert that one of the objectives of the Miller Act is to avoid delays in Government projects and that if the contractor fails to make his contributions, the union may delay the work by calling a strike. However, the cases cited herein are clear that the legislative intent of the Miller Act is to insure payment of the wages of those furnishing labor and materials. The Act is not concerned with the forestalling of strikes. Many actions of a contractor can cause delays—and adequate protection to the

United States is provided in the performance bond should such delay occur.

Second, the argument of petitioners also overlooks the fact that the primary purpose of the Miller Act is to provide for persons supplying labor and materials on Federal construction projects protection equal to that given in private construction by mechanics and materialmen's liens, and also to protect the United States (*United States to the use of Gibson v. Harman, supra*, 192 F. 2d 999). The statutes creating these liens are meant to protect and favor those who actually worked on, or contributed labor or materials to, the construction, improvement or repair of a building or other structure, thereby enhancing its value (*In re Louisville Daily News & Enquirer*, 20 Fed. Supp. 465, 466). Although no cases have been found, it could hardly be supposed that, were these private buildings, they would be lienable under the Mechanic's Lien laws for the unpaid contributions. The beneficiaries have been paid the wages due them for their contribution to the buildings; the sums unpaid are for benefits which are unrelated to the construction of the buildings and add nothing to the value thereof (*U. S. ex rel Southern G.-F. Co. v. Landis & Young, supra*, 16 Fed. Supp. 832).

Finally, there is no reason why public interest requires the Courts to extend the protection of the Miller Act to trustees of a Health and Welfare Fund in the face of the plain language of the Act which covers only the laborer himself.

To the contrary, it has been pointed out in an excellent discussion of the problems existing in the field of Health and Welfare Funds (8 Stanford Law Review 655, July 1956) that present public interest is concerned with the imposition of *controls* on the trustees of such funds to safeguard the rights of the employees, rather than extension of existing rights and powers of the trustees.

The intent of the Miller Act is to protect those furnishing labor by insuring to them payment of their wages in full. The public interest would not be served if the funds available because of such payment bond are depleted by permitting those not within the coverage of the Act to participate therein. The Miller Act provides that the amount of the payment bond be 50% of the total amount payable by the terms of the contract if the amount be \$1,000,000 or less; 40% in case the total amount payable be between \$1,000,000 and \$5,000,000; and if the amount be over \$5,000,000, the payment bond must be \$2,500,000. If the persons performing labor are to be paid *in full*, despite the limitation in the amount of the bond, the funds available should not be paid out unnecessarily.

It is pointed out again that a person performing labor loses no benefit under the trust agreement because the contractor fails to pay his contribution to the trustees. Eligibility to benefits is not dependent on the payment of the employer contribution. The unpaid contribution is simply a debt owed by the contractor to the fund by reason of a simple debtor-

creditor relationship. Thus, the basic protection of the person performing labor is satisfied when his wages are paid him in full.

B. THE SURETY IS NOT LIABLE FOR ATTORNEYS' FEES NOR FOR LIQUIDATED DAMAGES UNDER THE BOND.

The petitioners state on pages 40 and 41 of their brief that "Liquidated damages and attorneys' fees were a part of the agreed payment for labor . . . and as a part of such agreed payment, they should also be recoverable against the surety under a Miller Act bond." Inasmuch as they make no attempt to distinguish between contributions to the welfare fund, or attorneys' fees or liquidated damages, the petitioners apparently take the position that *any* benefits given by a contractor-employer to his employees as a result of collective bargaining, and any agreed monetary value ascribed thereto by the parties is recoverable against a Miller Act surety in that amount. Such can hardly be the law. As hereinafter pointed out, liquidated damages and attorneys' fees not being provided for by the contract between the contractor and the United States, nor being an integral part of the obligation to pay for labor performed, cannot be covered by the bond.

1. Attorneys' fees are not recoverable under the Miller Act.

Mechanics' liens were unknown at common law or at equity and are purely statutory (*In re Louisville*

Daily News & Enquirer, supra, 20 Fed. Supp. 465, 466.) In the absence of a valid statute that expressly authorizes an allowance or taxation of attorneys' fees as costs, they may not be allowed or taxed as costs. (*United States to the use of Watsabaugh & Co. v. Seaboard Surety Co., supra*, 26 Fed. Supp. 681.)

The Miller Act makes no express provision for the allowance of attorneys' fees in actions upon contractor's bonds. *United States v. Breeden* (1953), 110 Fed. Supp. 713, and *United States v. Henley* (1954), 117 Fed. Supp. 928, which permitted recovery of attorneys' fees where state statutes permit such recovery in actions on mechanics' liens are in conflict with *United States to the use of Watsabaugh & Co. v. Seaboard Surety Co., supra*. In any event, even if these cases were properly decided, they are not applicable because petitioners cite no California statute authorizing such recovery.

2. Liquidated damages are not recoverable.

The respondent, Hartford Accident and Indemnity Co., was not a party to the trust agreement, and as to it, the petitioners' damages, if any, are unliquidated.

It seems well settled in any event that a surety is not liable for damages whether liquidated or not, suffered in connection with a contract (*U. S. for the use of Edward E. Morgan Co., Inc., v. Maryland Casualty Co.*, 1945, 147 F. 2d 423) wherein the subcontractor sued the surety of the general contract under the Miller Act for damages consisting of the reasonable rental value of equipment. The subcontractor claimed

to have suffered such damage when its equipment was forced to remain idle by order of the contracting officer. In denying liability, the Court stated that it was "not warranted in writing liability into the contract and the statute." The Court pointed out that even though the subcontractor might sue the contractor or the Government for breach of contract, the surety has no liability because "nothing was owing for work, labor or equipment and nothing was owing for material in the prosecution of the work."

To the same effect is the case of *U. S. for the use of Gibson v. Harman, supra* (1951), 192 F. 2d 999, wherein the surety was held not to be bound to pay a delinquent Workmen's Compensation award.

V.

CONCLUSION.

There can be no recovery by the petitioners from the surety and the judgment of the Circuit Court affirming the granting of summary judgment in favor of the surety by the District Court should be affirmed because:

1. The obligations of the contractor under the Miller Act were satisfied and the condition of the bond fulfilled in that all persons performing labor were paid in full by the contractor without deduction.
2. The unpaid contributions to the Health and Welfare Fund for which recovery is sought were not wages required to be made by the contractor but were

an obligation on the part of the contractor arising from a trust agreement entered into independently, and after the execution, of the contract between the contractor and the United States to which the bond related.

(A) Even if the unpaid contributions had constituted deductions from wages, recovery could not have been had against the surety because the contractor's obligations to the persons performing labor had been satisfied in full and any duty the contractor had to make payments to the Welfare Fund did not arise under the contract between him and the United States.

3. Regardless of the nature of the employer-contributions, the plaintiffs, as trustees of the Welfare Fund, are not persons who furnished labor or materials for the performance of the contract and, therefore are not persons entitled to protection under the Miller Act or to recover against the surety on the payment bond.

4. Liquidated damages cannot be recovered from the surety under any theory because such damages are not covered or provided for in the payment bond furnished by the respondent herein. Moreover, if any damages are owed by the contractor to the trustees in this case they are owed pursuant to a separate agreement and are not, in any event, the obligation of the surety.

5. Attorneys' fees are not recoverable from the surety in this case under the Miller Act nor are they

recoverable under the trust agreement which was not related to the contract between the contractor and the United States.

Dated, San Francisco, California,
October 19, 1956.

Respectfully submitted,

JOHN W. DINKELSPIEL,
DINKELSPIEL & DINKELSPIEL,
Counsel for Respondents.

RICHARD C. DINKELSPIEL,
Of Counsel.

(Appendix A Follows.)

Appendix A

Filed June 26, 1956,

**Harold J. Ostley,
County Clerk**

By C. J. Towey, Deputy.

Entered June 27, '56, Book 3118, Page 086.

**Harold J. Ostley,
County Clerk**

G. C. Ericsson.

Anderson, McPharlin & Connors

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Los Angeles 13, California

Telephone: MAdison 5-2421

Attorneys for Defendant

**Indemnity Insurance Company of
North America**

**In the Superior Court of the State of California
in and for the County of Los Angeles**

No. 654,738

J. W. Bernard, et al.,

Plaintiffs,

vs.

**Indemnity Insurance Company
of North America, et al,**

Defendants.

Judgment

**The demurrer of defendant Indemnity Insurance
Company of North America to plaintiffs' first amended**

complaint came on regularly for hearing on June 8, 1956, in Department 26 of the above entitled court, before the Honorable Leon T. David, judge presiding, Dillavou, Cox & Mason appearing as attorneys for plaintiffs, and Anderson, McPharlin & Connors appearing as attorneys for demurring defendant; and the matter was at that time taken under submission. A memorandum and order having been made by the above entitled court sustaining the demurrer of defendant Indemnity Insurance Company of North America without leave to amend, on or about June 13, 1956,

It Is Ordered, Adjudged and Decreed that the above entitled action be and the same hereby is dismissed as against Indemnity Insurance Company of North America, defendant, and that defendant Indemnity Insurance Company of North America have judgment against the plaintiffs for its costs of suit incurred herein in the sum of \$.....

Dated: June 25, 1956

Leon T. David

Judge of the Superior Court

**J. W. Bernard, et al., vs. Indemnity Insurance
Company of North America, et al.**

No. 654,738

State of California, }
County of Los Angeles } ss.

I, Harold J. Ostly, County Clerk and Clerk of the Superior Court within and for the county and state aforesaid, do hereby certify the foregoing to be a correct copy of the original Memorandum and Order, filed June 14th, 1956; and Judgment, filed June 26th, 1956 and thereafter entered June 27th, 1956 in Book 3118 at Page 86 of Judgments, on file and of record in my office, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Superior Court this 9th day of July 1956.

Harold J. Ostley,
County Clerk and Clerk of the Superior
Court of the State of California, in
and for the County of Los Angeles.

By B. Lurani, Deputy.

Filed June 14, 1956,

Harold J. Ostley,

County Clerk

By C. J. Towey, Deputy.

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 654,738

J. W. Bernard, et al.,

Plaintiffs,

vs.

Indemnity Insurance Company
of North America, et al.,

Defendants.

Memorandum and Order

The allegations of the First Amended Complaint are to be considered true upon general demurrer. The question presented is whether trustees of a health and welfare fund are entitled to sue on a bond to insure the payment for labor and materials for public work to those furnishing the same (Govt. Code, sec. 4200-4205). The law provides (Govt. Code, sec. 4205; Exh. A) that the bond "shall by its terms insure to the benefit of any and all persons entitled to file claims under Section 1184e, now 1192.1 of the Code of Civil Procedure so as to give a right of action to them or their assigns in any suit brought upon the bond". The plaintiffs are trustees of the Carpenters Health and

Welfare Trust for Southern California. It is claimed that the defendant Hudson Construction Company, principal on the bond, engaged to pay such trustees for the fund the sum of five cents per hour per carpenter employee employed under certain public contracts, and ten cents per hour, in a later period on such contracts. These "Health and Welfare Contributions" have not be paid. Recovery for them is sought against the bonding company, and a general demurrer is interposed.

The defendant contractor after the date of the bonds (IV, V) agreed in writing with the Building and Construction Trades Council (V, Exh. B) to comply with a Labor Agreement (V, Exh. C) and this in turn is alleged to have required the Health and Benefit payments to be made (V) under an Agreement and Declaration of Trust (I, Exh. G) administered by plaintiffs. In that exhibit, Article III provides for "contributions to the fund" by the employer, and Article II, section 3 provides "Contributions to the Fund shall not constitute or be deemed to be wages due to the employees with respect to whose work such payments are made, and no employee shall be entitled to receive any part of the contributions made or required to be made to the Fund in lieu of the benefits provided by the Health and Welfare plan".

The Labor Agreement, Exhibit C (p. 31) establishes hourly wage rates, and lists separately the Health and Welfare payments.

As against defendant Hudson Construction Company, the employees were third-party beneficiaries of

the agreements pleaded as Exhibits B, C, and G. As in any contract, the consideration to pass for services included the stipulated hourly wage plus any other detriment promised by the contractor, and this consisted herein of the health and welfare fund contribution. By the nature of the agreements pleaded, the plaintiffs have, in my opinion, capacity to sue the contractor as plaintiffs for the benefit of such fund.

In relation to the obligations of the bonding company, it does not necessarily follow that the obligation of the bond is correlative to the contractual liability of the general contractor. The bonding procedure is established by law, in connection with public contracts. Liability is limited to the purposes and extent provided by the applicable statutes.

Since mechanics and materialmen's liens do not lie against governmental property, (*Miles v. Ryan*, 172 Cal. 205), the bonding procedure (Govt. Code, sec. 4200-4208) is designed to give mechanics and materialmen equivalent security in the form of the bond (Govt. Code, 4205) and the Government Code provision last cited holds the persons entitled to recover and the purposes for which recovery may be had are those specified by C.C.P. sec. 1192.1. So far as applicable here these are "Any materialman or person furnishing materials, provisions, provender, or other supplies", or "any person who performed work and labor upon the same", or "any person who supplies both work and materials" or those who furnish "appliances, teams or power" (C.C.P. 1181, 1200.1). Though not required as to the Governmental agency (Govt.

Code, sec. 4207) no action may be brought on the bond (C.C.P. sec. 1200.1) unless a notice was given to the surety within the claim period (Govt. Code, sec. 4208). There is no allegation that such was done.

The contractors bond "inures" to the benefit of any and all persons entitled to file claims under Section 1192.1 of the Code of Civil Procedure so as to give a right of action to them or their assigns in any suit brought upon the bond" (Govt. Code (1955) sec. 4205). C.C.P. (1955) sec. 1192.1 relates to "any person who performed work or labor" as the parties so entitled to sue. The plaintiffs clearly are not such parties. It is necessary to construe Government Code sections 4200-4208 in pari materia with the mechanics lien laws, and we believe it erroneous to conclude that one need not be within the scope of the mechanics lien provisions in order to proceed on the bond, in view of the express provisions of Government Code, section 4205, 4206 and 4208 incorporating the Code of Civil Procedure sections.

These contributions payable directly by the employer to the "welfare fund" obviously do not create specific funds for the benefit of specific employees, which such employee could collect or withdraw upon terminating his employment or withdrawing from membership in the union. The employees of the employer and their families were entitled under certain contingencies to receive medical and hospital benefits through the welfare fund. The fund created, however, is not solely for the benefit of the employees of the defendant contractor but for the benefit of the em-

employees of all employers who are members of the collective bargaining agreement.

A proprietary right in and to the Health and Welfare Fund, in the individual employee concerned, is expressly negatived by the Trust Agreement Exh. G. Article II, section 3, which provides "no employee shall be entitled to receive any part of the contributions made or required to be made to the fund in lieu of the benefits provided by the Health and Welfare plan. The Trust Agreement (Exh. G) is signed by the various unions from which the employed come; and carries no assignment of consideration by them; nor does the pleaded record show any individual assignment of the individual employees compensation—if indeed the Health and Welfare payments were part of it—to the union. The truth seems to be that the payment was, as indicated, a forced contribution from the employer. Under Labor Code section 227 (Stat. 1955c. 1570) it is a misdemeanor for an employer to fail to make such payments when contacted, but this was enacted subsequently to any bond here in question. If the Health and Welfare Fund payments are part of compensation for labor they are wages, and any assignment must specifically be in writing by the employee. (Labor Code sec. 300; 224.) The Trust Agreement Exh. G perhaps in an attempt to avoid the application of these sections, defines the contributions as not to be wages, which are the payment for "work or other services" (Webster's New Int. Dict. 2d ed.). That being so, (a) the bond does not cover such payments; and (b) if that is not so, then the plaintiffs

not having any of the required assignments are not entitled to sue on the bond, as they did not furnish anything to the job.

In a parallel situation, it is to be noted that in order to cover workmen's compensation payments, it was thought necessary to amend the statute to specifically include them (Govt. Code, sec. 4204, amended by Stat. 1947c. 1093, p. 2505).

We believe that neither the Complaint, nor the present First Amended Complaint state a cause of action against the bonding company, nor can such be stated under the agreements in question, and the applicable law.

This conclusion is fortified by the parallel holdings in (a) City of Portland, ex rel. National Hospital Association, 9 P.2d 115. This seems directly in point. (b) U.S. ex rel. Sherman v. Carter (C.C.A. 9th 1956) 229 F. 2d 645 (which has been appealed).

The attempt to distinguish these cases in Sherman v. Achterman, et al. (Superior Court S.F. App. Dept. #2368, 2370) on the basis that "The Oregon statute refers to the *persons* to whom claims shall be paid . . . but the California statute refers to the *subject matter*"; and a similar comment as to the federal Miller Act, pays too much attention to Government Code sec. 4204 and 4205 and neglects entirely the C.C.P. section 1184c which section 4205 incorporates; and C.C.P. sections 1184, 1184a, 1184b, 1184c and 1184e made applicable by Government Code section 4208, except as those sections are modified by Government Code 4207.

Under the Federal Bankruptcy Act, it is held that welfare fund claims are not "wage claims" entitled to priority under section 64(a)(2) of the Bankruptcy Act. (Matter of Brassel, etc. 135 F. Supp. 827).

It seems quite clear the right to sue the surety on a statutory undertaking involves both *person* and *subject matter* involved under the mechanics' lien laws, nothing more nor less.

Since the bonds are pleaded as Exhibits, allegations in the complaint as to their legal effect, i.e., that they include the health and welfare payments, are mere surplusage, and do not expand the cause of action first attempted to be stated in the original Complaint. (Castro v. R. Goold & Son Inc., 128 C.A.2d 40, 47.)

From the foregoing

It Is Hereby ordered:

That the demurrers of the defendant Indemnity Insurance Company of North America are sustained without leave to amend.

June 13, 1956

Leon T. David, Judge